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No. 93-955

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. BEESON, ET AL., PETITIONERS

v.

PHILLIPS, KING AND SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1823(e) (Supp. IV 1992) and this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), bar the assertion of claims against a receiver for a failed depository institution where the claims were asserted in lawsuits filed against the institution before its failure, but the facts necessary for evaluation of the claim were not contained in records of the institution at the time of its failure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 995 F.2d 611. The opinion of the district court (Pet. App. B1-B10) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Although the appendices to the petition are unpaginated, we refer for convenience to each appendix as if it were separately paginated.

STATEMENT

1. On January 5, 1985, First South Savings Association made a loan to petitioners and a number of other individuals in the amount of about $5.4 million, evidenced by a series of promissory notes that were secured by, among other things, shares of common stock in Lincoln Savings and Loan Association, an institution in Miami, Florida. The investors[2] used the funds to purchase a controlling interest in Lincoln Savings. In 1987, the Federal Home Loan Bank Board (the Board) determined that the purchase and ownership of Lincoln Savings by the investors violated applicable regulations. Because of that determination, the Board required petitioners and some of the other investors to withdraw from participation in Lincoln's affairs. See Pet. App. A2-A3, B1-B2.

After petitioners failed to make timely payments on the First South notes, First South accelerated the date of maturity of the notes and then, in January of 1989, filed a number of lawsuits in the state courts in Harris County, Texas, seeking to enforce the notes against the investors. On February 2, 1989, petitioners and some of the other investors responded by filing a separate state-court suit against First South and the lawyers who had represented the investors in the transactions (a group of the private respondents that petitioners collectively describe as the Law Firm, see Pet. 3). That suit contended that First South and the Law Firm fraudulently induced the investors to accept the loan from First South by concealing knowledge of the regulatory problems that

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[2] For convenience, we refer collectively to petitioners and the other individual borrowers as the investors.

led to the Board's orders requiring petitioners and some of the other investors to remove themselves from management of Lincoln Savings. See Pet. App. A3-A4.

2. On March 15, 1989, the Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) conservator of First South. On April 14, 1989, the Federal Deposit Insurance Corporation (FDIC), acting on behalf of FSLIC, removed the actions previously instituted by the institution to the United States District Court for the Southern District of Texas. On August 9, 1989, the Resolution Trust Corporation replaced FSLIC as conservator of First South, pursuant to Section 501(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 369 (codified in relevant part at 12 U.S.C. 1441a(b)(3)(A) (Supp. IV 1992)).[3] See Pet. App. A4.

3. On April 27, 1992, the federal district court granted the RTC's motion for summary judgment in its suit to enforce the notes against the investors. Pet. App. B1-B10. Although petitioners raised the defense of fraudulent inducement that was the basis for their separate state-court lawsuit, the district court rejected that claim, reasoning that any such defense would be "barred by the doctrine established in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)." Pet. App. B4.

4. The court of appeals affirmed. Pet. App. A1-A20. The court accepted the district court's conclusion

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[3] The Resolution Trust Corporation subsequently was appointed receiver of First South. References in this brief to the RTC refer to the Resolution Trust Corporation acting as receiver of First South.

that the *D'Oench, Duhme* doctrine bars petitioners' claims. Pet. App. A5-A7. It noted petitioners' argument that the RTC was not a holder in due course because the notes were not negotiable, but explained that "the *D'Oench, Duhme* doctrine may defeat [petitioners'] defenses to collection regardless of negotiability." *Id.* at A6.

The court rejected petitioners' argument that the *D'Oench, Duhme* doctrine could not bar their claims because those claims had been asserted in petitioners' state-court lawsuit before the failure of the institution. The court explained that mere notice of the existence of the defense was not sufficient to allow petitioners to bring their claim against the receiver:

> [T]he defense is barred because, although the [RTC] may have been put on notice o[f petitioners'] defense, the defense itself cannot be supported by the records of the bank. Were we to hold otherwise, federal and state banking authorities would be required to speculate as to the outcome of various lawsuits pending against the bank where such outcomes depend on oral testimony of bank officials. Such uncertainty is precisely what *D'Oench, Duhme* seeks to avoid.

Pet. App. A7.

ARGUMENT

Petitioners argue (Pet. 22-40) that the court of appeals erred in upholding the applicability of the *D'Oench, Duhme* doctrine[4] to bar their defenses to collection on the notes.[5] That claim is meritless.

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[4] Petitioners do not suggest that there is any distinction relevant to this case between the judicial *D'Oench, Duhme*

1. Petitioners argue at length (Pet. 22-35) that the RTC could not be a holder in due course of their notes because those notes were nonnegotiable. The court of appeals, however, did not decide that question, and it is therefore not properly before the Court. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).[6]

In any event, the benefits of holder-in-due-course status are entirely separate from the benefits of the *D'Oench, Duhme* doctrine. Holder-in-due-course pro-

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doctrine and its statutory counterpart in 12 U.S.C. 1823(e) (Supp. IV 1992). Although the opinion of the court of appeals referred only to the judicial doctrine, the RTC did rely on Section 1823(e) in its brief in the court of appeals. See RTC C.A. Br. 28-33. In our view, petitioners' defenses are barred by Section 1823(e) for substantially the same reasons their defenses are barred by *D'Oench, Duhme*. The RTC is entitled to rely on Section 1823(e) even though that provision on its face refers only to the FDIC. See 12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) (RTC "shall have the same powers and rights to carry out its duties [where it was appointed receiver for a failed savings and loan institution between December 31, 1988, and October 1, 1993] as the Federal Deposit Insurance Corporation has under sectio[n] * * * 1823 of this title.").

[5] Petitioners also challenge (Pet. 13-21) a holding of the court of appeals related to the statute of limitations on petitioners' claims against some of the private respondents. Because that challenge would not alter the rights of the RTC even if it were successful, this brief does not address that question.

[6] Moreover, that argument would be relevant only if holder-in-due-course status were relevant to the RTC's reliance on *D'Oench, Duhme*. Although the heading of the argument on page 35 of the petition suggests that petitioners believe that the lack of holder-in-due-course status in itself defeats the RTC's reliance on *D'Oench, Duhme*, the text of the petition does not make such a contention, but instead argues that *D'Oench, Duhme* does not bar petitioners' defenses. See Pet. 37-38.

tections arise out of principles of state law, generally codified in the Uniform Commercial Code (and frequently adopted, with appropriate modifications, as federal common law[7]), which in certain cases prevent the maker of a promissory note from interposing personal defenses against collection of the note when it has been transferred to a party other than the original payee. See Tex. Bus. & Com. Code Ann. § 3.305 (Vernon 1967); see generally James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* ch. 14, at 550-577 (1980). The *D'Oench, Duhme* doctrine, by contrast, is a rule of federal common law articulated by this Court, designed to provide special protection to federal receivers, above and beyond whatever protections they might receive under general principles of commercial law. See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457 (1942) (describing "federal policy to protect [the FDIC] and the public funds which it administers"). Hence, the availability—or unavailability—of holder-in-due-course status has no bearing on the merits of the RTC's reliance on *D'Oench, Duhme.*[8]

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[7] See, *e.g.*, *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248-1250 (5th Cir. 1990) (adopting a federal common law holder-in-due course rule); *FDIC* v. *Wood*, 758 F.2d 156, 159-162 (6th Cir.) (same), cert. denied, 474 U.S. 944 (1985).

[8] The Court recently denied another petition that argued that the FDIC could not rely on *D'Oench, Duhme* when it was not a holder in due course. *Century Centre Partners, Ltd.* v. *FDIC*, 113 S. Ct. 2997 (1993). Pages 5-9 of our brief in opposition in that case (No. 92-1650) summarize the consistent holdings of the courts of appeals recognizing the distinction between holder-in-due-course status and the protections

2. Petitioners briefly argue (Pet. 38-40) that their defense of fraudulent inducement is not vitiated by the *D'Oench, Duhme* doctrine. First, they contend (Pet. 38-39) that the defense was reflected in the records of the institution, relying on the lawsuit, asserting that claim, that was pending at the time the institution failed. As the court of appeals explained, however, the existence of the lawsuit could not possibly have caused the records of the institution to reveal that claim to the regulators in the sense required by *D'Oench, Duhme*, because the validity of the claim depended not on the terms of any documents in the records of the institution, but on the oral statements and mental impressions of the institution's officers at the time the transaction was closed. Pet. App. A7; cf. *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987) (noting that the purpose of the statutory codification of *D'Oench, Duhme* was "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets").

Petitioners also contend (Pet. 39-40) that their defense is viable because it involved "fraudulent concealment," rather than "a personal defense." That contention is foreclosed by this Court's decision in *Langley*, 484 U.S. at 93 ("We conclude * * * that neither fraud in the inducement nor knowledge by the FDIC is relevant to [Section 1823(e)]'s application.").[9]

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recognized in *D'Oench, Duhme*. We have provided a copy of our brief in *Century Centre* to counsel for petitioners.

[9] The question before the Court in *Langley* involved the interpretation of Section 1823(e), but the opinion relied heavily on the Court's understanding of *D'Oench, Duhme* and did not suggest that the common-law *D'Oench, Duhme* doctrine would be treated any differently. See, *e.g.*, 484 U.S. at 92-93.

Although petitioners contend (Pet. 39) that their claim is not foreclosed by *Langley* because it "is not a condition on repayment of the [n]otes," the only claim presented by the RTC to the district court was a claim for payment of the notes. Hence, if petitioners' defense does not establish a condition defeating their obligation to repay the notes, it is not relevant to the suit at all.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners' suggestion (Pet. 40) that *Langley* is inapplicable because the notes in this case were not negotiable is meritless for the reasons discussed in Point 1, *supra*.